(3)

No. 89-551

In The

Supreme Court of the United States

October Term, 1989

GEORGE JUSTICE MOOR,

Petitioner,

vs.

CITY OF AUBURN HILLS, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CASE NO. 89-1685

RESPONDENTS' BRIEF IN OPPOSITION

– AND APPENDICES –

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COUNTER-STATEMENT OF QUESTIONS FOR REVIEW

Petitioner, who has filed his petition *in pro se*, has listed nine questions to be presented for review. These are somewhat argumentative and inartfully posed. However, they can all be distilled down into the following two questions:

1. DID THE DISTRICT COURT PROPERLY DISMISS THE PROCEDURAL DUE PROCESS CLAIM IN THAT THERE WAS NO DEPRIVATION OF A FEDERAL RIGHT WITHOUT DUE PROCESS OF LAW BY FINDING THERE WAS AN ADEQUATE STATE REMEDY?
2. DID THE DISTRICT COURT PROPERLY DISMISS THE SUBSTANTIVE DUE PROCESS CLAIM ON THE BASIS OF QUALIFIED IMMUNITY?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Maurice James Nolin III and the City of Auburn Hills, respectfully request that this Court deny the Petition for Writ of Certiorari seeking to review the Sixth Circuit Opinion in this case, as none of the criteria of Supreme Court Rule 17 are present and there are no "special and important reasons therefor," as is argued more fully herein.

COUNTER-STATEMENT OF FACTS

It is difficult to properly respond to Petitioner's Statement of Facts. Virtually all of the statement is irrelevant to this appeal and a great portion of it is not supported anywhere in the record of this case.

Petitioner George Justice Moor was arrested by Auburn Hills Police Officer Maurice Nolin III on the evening of

December 4, 1985, for interfering with Officer Nolin in the performance of his duties.

A jury trial ensued April 15, 1986, resulting in a conviction. That conviction was appealed to the Oakland County Circuit Court and overturned on the basis that the appearance citation merely contained a conclusion of interference with a police officer without alleging adequate facts.

Subsequent to the reversal of the conviction Petitioner, among other things, filed the action in the Federal District Court for the Eastern District of Michigan.

COUNTER-STATEMENT OF THE CASE

On April 2, 1987, Petitioner, *in pro se*, filed a Complaint which was followed by a First Amended Complaint on April 27, 1987. On July 13, 1987, the Hon. Robert DeMascio, U.S. District Judge, on his own initiative, entered an order dismissing Counts II, V and VI of the First Amended Complaint with prejudice and Counts III and IV without prejudice (Respondents' Appendix B). This left only Count I of the Complaint which constituted a cause of action under 42 USC 1983, characterized as "constitutional and civil rights act violation."

The initial order dismissed Counts II and VI in that they requested declaratory relief and the Court determined there was not an "actual controversy."

Counts III and IV alleged causes of action for false arrest and malicious prosecution which the Court dismissed on the basis that, although they were within pendent jurisdiction, the state claims substantially predominated over the federal claim and should be resolved by the state courts.

Count V was dismissed in that it sought to impose civil liability for Officer Nolin's alleged perjured testimony during Petitioner's criminal trial.

On May 2, 1988, Defendants filed a motion for summary judgment. Pursuant to that, the District Court issued an Opinion dated May 27, 1988, together with a judgment dismissing Petitioner's Complaint (Respondents' Appendix C). An appeal was pursued by Petitioner to the United States Court of Appeals (6th Circuit), which upheld the District Court without oral argument on June 6, 1989 (Respondents' Appendix A).

SUMMARY OF ARGUMENT

Petitioner claims that his "civil rights" were violated. Much of his petition contains facts that are either unsupported by the record or irrelevant.

Basically, in order to prevail he must prove that he was either denied procedural or substantive due process. The law as to either of these criteria has been well established by this Honorable Court. He cannot successfully claim procedural due process in that there was an adequate state remedy. That is argued separately and in detail under Section 1 of the Argument, *infra*.

Secondly, as to substantive due process, Petitioner has failed to prove that there was either activity which would "shock the judicial conscience" under the doctrine of *Rochin* v *California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 2d 183 (1952), or that Officer Nolin was not entitled to qualified immunity because he failed to exercise good faith.

Again, these considerations are discussed in Section 2 of the Argument, *infra*, entitled "Substantive Due Process."

ARGUMENT

PROCEDURAL DUE PROCESS CLAIM

I. THE DISTRICT COURT PROPERLY DISMISSED THE PROCEDURAL DUE PROCESS CLAIM IN THAT PETITIONER DID NOT DEMONSTRATE A DEPRIVATION OF A FEDERAL RIGHT WITHOUT DUE PROCESS OF LAW BECAUSE THERE WAS AN ADEQUATE STATE REMEDY.

Judge DeMascio in dismissing the procedural due process claim, stated at pages 4 and 5 (Respondents' Appendix pp C-2–C-4):

> "To state a cause of action under 42 U.S.C. Sec. 1983, plaintiff must allege that some person has deprived him of a federal right and that that person acted under color of state law. *Gomez* v *Toledo*, 446 U.S. 635 (1980). There is no question that defendants in this matter acted under color of state law. The question we decide is whether plaintiff has been deprived of a 'federal right.' It is somewhat difficult to decipher exactly what deprivations he complains of in his 18 page complaint. Given the dismissal of some of the claims in his first amended complaint, however, and constitutional provisions he cites, we discern two basic claims. The first claim arises out of his arrest; he essentially alleges that he was arrested without probable cause in violation of the fourth amendment and appears to allege that he was subjected to cruel and unusual punishment in violation of the eighth amendment. Plaintiff's second claim arises out of his trial on the disorderly conduct charge. He claims that Nolin's allegedly perjured testimony deprived him of his right to due process under the fifth

and fourteenth amendments. We will address the second claim first.

Plaintiff's fourteenth amendment claim essentially alleges a procedural, rather than a substantive deprivation. We assume for purposes of this motion that plaintiff has demonstrated that he was deprived of a protected liberty interest. He must allege and demonstrate, however, that such deprivation was without due process of law. *Bacon* v *Patera*, 772 F2d 259, 263-64 (6th Cir. 1985). Plaintiff has not alleged and the facts he recites do not suggest that his arrest was pursuant to an established policy or procedure of the city. We must, therefore, construe his claim as one alleging that Nolin's actions were random and unauthorized. To prevail on this type of claim, plaintiff must allege and demonstrate that his state remedies for such a deprivation are inadequate. *Bacon*, 772 F2d at 264; *Wilson* v *Beebe*, 770 F2d 578, 583-84 (6th Cir. 1985). If the state provides an adequate post-deprivation remedy, the deprivation was not 'without due process of law.' Plaintiff does not allege the inadequacy of state remedies. Indeed, plaintiff invoked such remedies in his first amended complaint. He clearly has access to a tort action for false arrest, false imprisonment, malicious prosecution and negligence. Although his remedies might be different from those available under section 1983, this does not render his state remedies inadequate. *Wilson*, 770 F2d at 583; *Davey* v *Tomlinson*, 627 F.Supp. 1458, 1464 (E.D. Mich. 1986). Plaintiff's procedural due process claims must, therefore, be dismissed."

The Judge, therefore, gave Petitioner the benefit of assuming he had been deprived of a protected liberty

interest and properly pointed out that he must allege and demonstrate a deprivation which was without due process of law.

This is the rule of *Parratt* v *Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed. 2d 420 (1981), as discussed in *Wilson* v *Beebe*, 770 F2d 578 (6th Cir. 1985). Judge Lively, writing for the Court pursuant to an en banc hearing, wrote at page 583:

> "In *Parratt* v *Taylor* (citation omitted) the Supreme Court established a limitation of the availability of section 1983 in procedural due process cases. Where the only violation complained of is a 14th amendment claim of deprivation of property without due process of law, the federal court must determine whether the state provides remedies for the tort which satisfy the requirements of procedural due process . . . if the state does provide a remedy which meets the standard, then the deprivation, though under color of state law, is not without due process of law. The state remedy need not be as complete as that which would have been provided by section 1983."

Petitioner could not successfully claim that there was an inadequate state remedy, as there clearly was. Not only was the District Court clearly correct in that determination; because of that consideration, it also properly declined pendent jurisdiction.

SUBSTANTIVE DUE PROCESS

II. THE DISTRICT COURT PROPERLY DISMISSED THE SUBSTANTIVE DUE PROCESS CLAIM BY DETERMINING THAT OFFICER NOLIN WAS ENTITLED TO QUALIFIED IMMUNITY AND THAT THERE WAS NO EGREGIOUS VIOLATION THAT WOULD SHOCK THE CONSCIENCE OF THE COURT.

As to this claim, Judge DeMascio stated at pages 6-7 of his Opinion (Respondents' Appendix pp. C-4 – C-5):

> "Plaintiff also raises a substantive due process claim; i.e., that his fourth amendment right to be free from unreasonable search and seizure was violated by his arrest without probable cause. Before addressing the factual issue of probable cause, we must decide whether defendants are shielded by the doctrine of qualified immunity. *Harlow* v *Fitzgerald*, 457 U.S. 800 (1982). The issue of immunity is purely a legal one. Id.; *Donta* v *Hooper*, 774 F2d 716 (6th Cir. 1985).
>
> The doctrine of qualified immunity protects an official's discretionary conduct where it 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' *Harlow*, 457 U.S. at 818. The test is purely objective; the officer's subjective state of mind is not relevant. *Davey*, 627 F.Supp. at 1465. The immunity 'is pierced only if there clearly was not probable cause at the time the arrest was made. The officers must establish that they acted in good faith and had a reasonable belief that their conduct was permissible.' Id. (citations omitted). Although the facts in this case are not well developed, plaintiff concedes in

his complaint that he was ordered on at least two occasions to leave the site where Nolin was questioning his son and refused to do so. This fact alone establishes a good faith basis for Nolin's belief that he had probable cause to arrest plaintiff for interfering with a police officer. The jury's guilty verdict, although overturned, also supports a finding of good faith. While plaintiff ultimately was acquitted, the 'Constitution does not guarantee that only the guilty will be arrested. If it did, section 1983 would provide a cause of action for every defendant acquitted — indeed for every suspect released.' *Baker* v *McCollan*, 443 U.S. 137 (1979). We conclude that Nolin is shielded by qualified immunity. We need not address the claims against the other defendants because they cannot be held liable under a respondeat superior theory.

Plaintiff also alleges a claim under the eighth amendment. This claim presumably arises out of his allegations that he was frisked in public by Nolin and pushed into the back of a police car. We note that the eighth amendment prohibition against cruel and unusual punishment applies only to those convicted of a criminal offense. Since plaintiff's conviction was reversed, his claim must be for deprivation of due process. *Bell* v *Wolfish*, 441 U.S. 520 (1979). This is not a case, however, which 'fits the other prong of substantive due process — official acts which may not take place no matter what procedural protections accompany them.' *Beebe*, 770 F2d at 586. The conduct alleged in the complaint although certainly not condonable, is not such

> that 'shocks the conscience' of the court. This claim must also be dismissed."

Petitioner initially claims that the actions of Officer Nolin "shock the judicial conscience."

Judge DeMascio stated at page 2 of his Opinion (Respondent's Appendix pg. C-1):

> "The facts of this case are not well developed in the record. For purposes of this motion, we will assume as true the facts stated in plaintiff's second amended complaint."

And again at page 6 (Respondent's Appendix pg. C-4):

> "Although the facts in this case are not well developed, plaintiff concedes in his complaint that he was ordered on at least two occasions to leave the site where Nolin was questioning his son and refused to do so."

The Court did properly assume Plaintiff's Complaint was true and reviewed the facts in detail so far as they were presented and found that the action of the officer did not so qualify.

The "shocking the conscience" doctrine was articulated by this Court in *Rochin* v *California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 2d 183 (1952).

Rochin involved this Court overturning a conviction of possession of narcotics which were obtained through extracting capsules from the defendant's stomach without his consent. Applying Constitutional standards to this, Justice Frankfurter stated at page 209:

> "Applying these general considerations to the circumstances in the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more

> than offend some fastidious, squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents — this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit Constitutional differentiation."

Certainly under the circumstances of this case, Petitioner cannot claim any such egregious deprivation to merit implementation of the *Rochin* "shocking of the conscience" doctrine.

The question then turns to whether or not there was a violation of a specific constitutional guarantee and whether or not Officer Nolin was entitled to immunity.

Petitioner asserts a violation of his constitutional right to be on the street, citing *Shuttlesworth* v *Birmingham*, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed. 2d 176 (1965).

A careful and thorough reading of the *Shuttlesworth* case does not support Petitioner and, in fact, supports Respondents' position. Defendant *Shuttlesworth* was charged with violation of two City of Birmingham, Alabama ordinances, sections 1142 and 1231, which state respectively:

> "It shall be unlawful for any person or any number of persons to so stand, loiter or walk upon any street or sidewalk in the city so as to obstruct free passage over, on or along said street or sidewalk. It shall also be unlawful for any

> person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on; and
>
> It shall be unlawful for any person to refuse or fail to comply with any lawful order, signal or direction of a police officer."

Regarding the second sentence of 1142, the Court said at 213 S.Ct.:

> "Literally read, therefore, the second part of this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city . . .
>
> The matter is not one which need be exhaustively pursued, however, because, as the respondent correctly points out, the Alabama Court of Appeals has not read section 1142 literally, but has given to it an explicitly narrowed construction. The ordinance, that court has ruled 'is directed at obstructing the free passage over, on or along the street or sidewalk by the manner in which a person accused stands, loiters or walks thereupon. Our decisions make it clear the mere refusal to move on after a police officer requesting that person standing or loitering shall do so, is not enough to support the offense'.
>
> The Alabama Court of Appeals has thus authoritatively stated that section 1142 applies only when a person who stands, loiters or walks on a street or sidewalk so as to obstruct free passage refuses to obey a request by an officer to move on. It is our duty, of course, to accept this state judicial construction of the ordinance . . . as so construed we cannot say the ordinance is un-

> constitutional though it requires no great feat of imagination to envisage situations in which such an ordinance might be unconstitutionally applied."

There is no question Petitioner or any other person constitutionally has a right of free access to public streets within the limitations imposed by the legitimate police power of the state. The fact that Mr. Moor was on public property, to-wit: a street, if in fact that is where he was at the time of his arrest, has nothing to do with the offense with which he was charged. The charge was a violation of the Ordinance of Auburn Hills, Section 62.350, section 5(a), which reads:

> "INTERFERENCE WITH POLICE DEPARTMENT AND RELATED OFFENSES
>
> No person shall resist any police officer, any member of the police department, or any person duly empowered with police authority while in the discharge or apparent discharge of his duty, or in any way interfere with or hinder him in the discharge of his duty."

Therefore, the *Shuttlesworth* case is totally inapplicable in that Mr. Shuttlesworth was merely asked to leave a public street without the predicate of interfering with other peoples' right to free movement or a police officer in his duty.

Petitioner's citation of *Gregory* v *Chicago*, 394 U.S. 164, 89 S.Ct. 946 (1969) is most curious.

The holding of this Court was that the arrest of Dick Gregory and others during a civil rights march was violative of due process in that there was no evidence that the defendants were disorderly *and had not been charged with refusing to obey a police officer.* They were merely charged with holding a peaceful demon-

stration protected by the First Amendment. Chief Justice Warren stated at page 947:

> "However reasonable the police request may have been and however laudable the police motives, petitioners were charged and convicted for holding a demonstration, not for refusal to obey a police officer."

A footnote to the opinion on the same page (947) states:

> "The Trial Judge charged solely in terms of the Chicago ordinance. Neither the ordinance nor the charge defined disorderly conduct as the refusal to obey a police officer."

Petitioner Moor was charged and convicted under an ordinance which specifically defined disorderly conduct as interfering with a police officer.

Mr. Moor's conviction was overturned in that the appearance citation given him was too vague. It had nothing to do with the constitutionality of the ordinance itself. Defendant Nolin did not order Mr. Moor from the street, but merely attempted to prevent his obvious interference with his duty to investigate a complaint.

Petitioner claims the ordinance is inconsistent with the right of citizens to have peaceful access to public streets. This argument totally misses the point that any exercise of a constitutional right must certainly be subject to the state's police power. While one has a right to travel and be in public places, they obviously cannot do that with impunity, i.e., they cannot drive an automobile on a public highway under the influence of alcohol or in excess of posted speeds.

There clearly was no violation of a specific substantive constitutional right.

Secondly, the District Court properly found that Officer Nolin acted in good faith and, therefore, had the benefit of immunity.

That determination is consistent with *Harlow* v *Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed. 2d 396 (1982).

Justice Powell, writing for this Court in *Harlow*, stated at page 2738:

> "We therefore hold that governmental officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable man should have known."

The general rule in applying *Harlow* is enunciated in *Floyd* v *Farrell*, 765 F2d 1 (1st Cir. 1985) at page 5, to the effect that an officer's immunity:

> "Is pierced only if there is clearly no probable cause at the time the arrest was made."

In *Flair* v *Fox*, 402 F.Supp. 818 (M.D. Tenn. 1975), it was stated at page 822:

> "The officers must establish they acted in good faith and had reasonable belief their conduct was reasonable."

Although Petitioner argues that he was arrested without "probable cause," good faith is more the issue than probable cause.

In 5 Am Jur 2d "Arrest" section 44, page 735, it is stated:

> "Probable cause for an arrest is defined as to be reasonable grounds of suspicion, supported by circumstances sufficiently strong in themselves

> to warrant a cautious man on believing the accused to be guilty. Many definitions using somewhat different wording have been used by the courts, but it has been said the substance of all of them is a reasonable ground for belief of guilt. To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith."

What we are dealing with here is more appropriately a good faith argument than actual probable cause, which is usually argued in the context of the issuance of a warrant. Under these circumstances, what occurred is an arrest without a warrant for which Officer Nolin had the power pursuant to MCLA 764.15; MSA 28.874, which states in part:

> "A police officer may without a warrant arrest a person in the following situations:
>
> (a) When a felony, misdemeanor or ordinance violation is committed in the police officer's presence."

The question of good faith is most adequately expressed in Judge DeMascio's Opinion, where he stated at page 6 (Respondents' Appendix pp. C-4–C-5):

> "Although the facts of this case are not well developed, Plaintiff concedes in his complaint that he was ordered on at least two occasions to leave the site where Nolin was questioning his son and refused to do so. This fact alone establishes a good faith basis for Nolin's belief that he had probable cause to arrest plaintiff for interfering with a police officer. The jury's guilty

verdict, although overturned, also supports a finding of good faith."

Therefore, as to the substantive due process claim, the Court properly found that Defendant Nolin was cloaked with qualified immunity and further properly found no evidence of a lack of good faith.

CONCLUSION

The Supreme Court rules provide for the considerations governing review on Certiorari. These considerations are contained in Supreme Court Rule 17. That rule states, in summary, that Certiorari will only be granted when there are "special and important reasons therefor." This statement is further amplified by subparagraphs (a) through (c), which delineate the character of those important reasons.

Those presuppose a conflict between the Federal Courts of Appeal and/or a state court or, at the very least, an instance where a state or federal court has decided an important question of federal law which has not been and should be settled by this Court. As is clear from the argument previously presented, no such criteria exists in this case.

Two federal courts, the District Court for the Eastern District of Michigan and the U.S. Sixth Circuit Court of Appeals, have reviewed this matter and decided the case in harmony with existing precedent from this Court. Certiorari under these circumstances is not

appropriate, and we respectfully request that this Court deny the petition.

Respectfully submitted,

PATTERSON & PATTERSON, WHITFIELD, MANIKOFF, WADDELL, MOORE AND WHITE, P.C.

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DATED: November 20, 1989

APPENDICES TO BRIEF IN OPPOSITION

• • •

APPENDIX A

OPINION

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

(United States Court of Appeals – Sixth Circuit)

(Filed June 6, 1989)

(GEORGE J. MOOR, Plaintiff-Appellant, v. CITY OF AUBURN HILLS; AUBURN HILLS POLICE DEPARTMENT; ROBERT F. RAYNOR, individually and as Police Chief for the City of Auburn Hills; MAURICE JAMES NOLIN, individually and as Police Officer for the City of Auburn Hills; JAMES P. SHEEHY, individually and as Magistrate for the State of Michigan, Defendants-Appellees — No. 88-1685; ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN)

BEFORE: MERRITT and MARTIN, Circuit Judges; and LIVELY, Senior Circuit Judge.

George Moor appeals from an order granting summary judgment in favor of the City of Auburn Hills, the Auburn Hills Police Department, Police Chief Robert Raynor, Officer Maurice Nolin, and James Sheehy, a magistrate for the State of Michigan. Moor claimed that the defendants violated his constitutional rights to

substantive and procedural due process and that they subjected him to false arrest and malice prosecution. Moor argues that the court erred dismissing counts II through VI of his complaint in an order dated July 13, 1987 and in granting summary judgment dismissing count I of his complaint by an order dated May 27, 1988.

Having carefully reviewed the record and having considered the arguments presented in the briefs, we affirm the judgment of the district court for the reasons stated in the district court's orders dated July 13, 1987 and May 27, 1988.

APPENDIX B

DISTRICT COURT ORDER OF JULY 13, 1987

(United States District Court —
Eastern District of Michigan — Southern Division)

(Dated July 13, 1987)

(GEORGE JUSTICE MOOR, Plaintiff, v. CITY OF AUBURN HILLS, a municipal corporation, et al., Defendants — Civil No. 87CV71239DT; Hon. Robert E. DeMascio)

Plaintiff filed his first amended complaint in this action on April 27, 1987. Plaintiff alleges six counts against defendants, purportedly based on both state and federal law, all arising from plaintiff's arrest and prosecution for disorderly conduct. Plaintiff alleges that his conviction for this offense was reversed by the Oakland County Circuit Court. For the reasons stated herein, we now dismiss counts II through VI of the first amended complaint.

Count I of the complaint alleges that defendants City of Auburn Hills, City of Auburn Hills Police Department, Robert F. Raynor, and Maurice James Nolin III deprived plaintiff of rights secured under the United States Constitution. This claim is based on 42 U.S.C. § 1983 and serves to invoke the jurisdiction of this court. Count II of the complaint seeks a declaration that the Auburn Hills municipal ordinance under which plaintiff was prosecuted be declared unconstitutional. Count VI asks this court to declare that the conduct of the state district court trial judge who presided over plaintiff's trial was violative of plaintiff's constitutional rights. Clearly, plaintiff has no standing to pursue either of the claims contained in counts II

and VI against the defendants. He cannot credibly allege that he will again be arrested under the challenged ordinance and brought before the same trial judge. *See Los Angeles* v. *Lyons*, 103 S.Ct. 1660 (1983). As such, neither of these claims present an "actual controversy" under the Declaratory Judgment Act.

Count III of the complaint pleads a cause of action for false arrest and imprisonment. Count IV purports to state a claim for malicious prosecution. Both of these claims arise under state law and are within the pendent jurisdiction of this court. We find, however, that these claims substantially predominate over the federal claim and thus should be resolved by the state courts. *See Winterhalter* v. *Three Rivers Motors Company*, 312 F.Supp. 962, 963-64 (W.D. Pa. 1970). Accordingly, counts III and IV of the first amended complaint are dismissed without prejudice to plaintiff's right to refile these claims in state court.

Finally, count V of the complaint seeks to impose criminal penalties upon Officer Nolin for his role in testifying at plaintiff's trial. This claim is purportedly based on 42 U.S.C. § 1988. Clearly, this provision does not support the relief requested by plaintiff. Accordingly, count V of the complaint must be dismissed. Plaintiff may, however, amend count I of his complaint to seek recovery of attorney fees actually incurred in defending his state court prosecution as a foreseeable result of Officer Nolin's allegedly perjured testimony. *See Lykken* v. *Vaveck*, 366 F.Supp. 585, 597 (D. Minn. 1973).

NOW, THEREFORE, IT IS ORDERED that count II, count V and count VI of the first amended complaint be and the same hereby are DISMISSED with prejudice;

IT IS FURTHER ORDERED that count III and count IV of the first amended complaint be and the same hereby is DISMISSED without prejudice;

IT IS FURTHER ORDERED that plaintiff file an amended complaint within 10 days of the date of this order setting forth only his claim under 42 U.S.C. § 1983 against the four defendants named in count I, if he wishes to pursue this claim.

/s/ Robert E. DeMascio
United States District Judge

Dated: July 13, 1987

(Certification Omitted)

APPENDIX C

DISTRICT COURT ORDER OF MAY 27, 1988

(United States District Court —
Eastern District of Michigan — Southern Division)

(Dated May 27, 1988)

(GEORGE JUSTICE MOOR, Plaintiff, v. CITY OF AUBURN HILLS, et al., Defendants — Civil No. 87CV71239DT; Hon. Robert E. DeMascio)

Plaintiff commenced this action, *pro se*, in April 1987. In his first amended complaint, plaintiff alleged six counts against defendants arising from his arrest and prosecution for disorderly conduct. By order dated July 13, 1987, this court dismissed counts II through VI of the complaint. Plaintiff thereafter amended count I of the complaint, which is based upon 42 U.S.C. § 1983. All defendants now move for summary judgment on that remaining count.

The facts of this case are not well developed in the record. For the purposes of this motion, we will assume as true the facts stated in plaintiff's second amended complaint. Plaintiff alleges that on December 4, 1985 a complaint was filed with the City of Auburn Hills Police Department against his son. Officer Nolin was dispatched to the scene. Plaintiff thereafter arrived on the scene to provide his son with his wallet containing identification. When plaintiff identified himself to Nolin and asked why his son was being detained, Nolin allegedly ordered plaintiff to leave the scene so he could question plaintiff's son in private. Plaintiff requested to be present during questioning but again was ordered to leave the scene. He apparently refused to

leave and Nolin arrested him for disorderly conduct; i.e., interfering with a police officer during the performance of his duties. Nolin thereafter transported plaintiff to the police station where he was processed.

On December 19, 1985, plaintiff pleaded not guilty to the charge of being a disorderly person. Trial on the charge commenced on April 15, 1986 in the Fifty Second District Court. Nolin apparently testified that he did not order plaintiff from the scene until after plaintiff thwarted his attempts to question plaintiff's son. Plaintiff alleges that Nolin also testified, or implied, that plaintiff had been drinking and uttered vulgarities at the scene. Plaintiff denies any drinking or vulgar language. Plaintiff testified in his own behalf and called three other witnesses. The jury found plaintiff guilty of interfering with a police officer during the performance of his duties. The Oakland County Circuit Court reversed the conviction on January 27, 1987.

Plaintiff alleges that defendant Nolin violated his rights under the first, fourth, fifth, eighth and fourteenth amendments and that the chief of police, the police department and city are vicariously liable for Nolin's conduct. Defendants now move for summary judgment on the ground that they are immune from liability under state law. The motion fails to address the federal nature of plaintiff's complaint and gives little, if any, guidance to the court in this matter. The court has reviewed the amended complaint and file in this matter, however, and concludes that plaintiff's complaint must be dismissed.

To state a cause of action under 42 U.S.C. § 1983, plaintiff must allege that some person has deprived him of a federal right and that that person acted under color of state law. *Gomez* v. *Toledo*, 446 U.S. 635 (1980). There is no question that defendants in this matter

acted under color of state law. The question we decide is whether plaintiff has been deprived of a "federal right." It is somewhat difficult to decipher exactly what deprivations he complains of in his 18-page complaint. Given the dismissal of some of the claims in his first amended complaint, however, and constitutional provisions he cites, we discern two basic claims. The first claim arises out of his arrest; he essentially alleges that he was arrested without probable cause in violation of the fourth amendment and appears to allege that he was subjected to cruel and unusual punishment in violation of the eighth amendment. Plaintiff's second claim arises out of his trial on the disorderly conduct charge. He claims that Nolin's allegedly perjured testimony deprived him of his right to due process under the fifth and fourteenth amendments. We will address the second claim first.

Plaintiff's fourteenth amendment claim essentially alleges a procedural, rather than a substantive deprivation. We assume for purposes of this motion that plaintiff has demonstrated that he was deprived of a protected liberty interest. He must allege and demonstrate, however, that such deprivation was without due process of law. *Bacon* v. *Patera*, 772 F.2d 259, 263-64 (6th Cir. 1985). Plaintiff has not alleged and the facts he recites do not suggest that his arrest was pursuant to an established policy or procedure of the city. We must, therefore, construe his claim as one alleging that Nolin's actions were random and unauthorized. To prevail on this type of claim, plaintiff must allege and demonstrate that his state remedies for such a deprivation are inadequate. *Bacon*, 772 F.2d at 264; *Wilson* v. *Beebe*, 770 F.2d 578, 583-84 (6th Cir. 1985). If the state provides an adequate post-deprivation remedy, the deprivation was not "without due process of law." Plaintiff does not allege the inadequacy of state

remedies. Indeed, plaintiff invoked such remedies in his first amended complaint. He clearly has access to a tort action for false arrest, false imprisonment, malicious prosecution and negligence. Although his remedies might be different from those available under § 1983, this does not render his state remedies inadequate. *Wilson*, 770 F.2d at 583; *Davey* v. *Tomlinson*, 627 F.Supp. 1458, 1464 (E.D. Mich. 1986). Plaintiff's procedural due process claims must, therefore, be dismissed.

Plaintiff also raises a substantive due process claim; i.e., that his fourth amendment right to be free from unreasonable search and seizure was violated by his arrest without probable cause. Before addressing the factual issue of probable cause, we must decide whether defendants are shielded by the doctrine of qualified immunity. *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). The issue of immunity is purely a legal one. *Id.*; *Donta* v. *Hooper*, 774 F.2d 716 (6th Cir. 1985).

The doctrine of qualified immunity protects an official's discretionary conduct where it "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. The test is purely objective; the officer's subjective state of mind is not relevant. *Davey*, 627 F.Supp. at 1465. The immunity "is pierced only if there clearly was not probable cause at the time the arrest was made. The officers must establish that they acted in good faith and had a reasonable belief that their conduct was permissible." *Id.* (Citations omitted.) Although the facts in this case are not well developed, plaintiff concedes in his complaint that he was ordered on at least two occasions to leave the site where Nolin was questioning his son and refused to do so. This fact alone establishes a good faith basis for Nolin's belief that he had probable cause to arrest plaintiff for inter-

fering with a police officer. The jury's guilty verdict, although overturned, also supports a finding of good faith. While plaintiff ultimately was acquitted, the "Constitution does not guarantee that only the guilty will be arrested. If it did, section 1983 would provide a cause of action for every defendant acquitted — indeed for every suspect released." *Baker* v. *McCollan*, 443 U.S. 137 (1979). We conclude that Nolin is shielded by qualified immunity. We need not address the claims against the other defendants because they cannot be held liable under a respondeat superior theory.

Plaintiff also alleges a claim under the eighth amendment. This claim presumably arises out of his allegations that he was frisked in public by Nolin and pushed into the back of a police car. We note that the eighth amendment prohibition against cruel and unusual punishment applies only to those convicted of a criminal offense. Since plaintiff's conviction was reversed, his claim must be for deprivation of due process. *Bell* v. *Wolfish*, 441 U.S. 520 (1979). This is not a case, however, which "fits the other prong of substantive due process — official acts which 'may not take place no matter what procedural protections accompany them.'" *Beebe*, 770 F.2d at 586. The conduct alleged in the complaint although certainly not condonable, is not such that "shocks the conscience" of the court. This claim must also be dismissed.

We conclude that plaintiff has failed to adequately allege a procedural due process violation and that his substantive due process claims are barred by the doctrine of qualified immunity. Plaintiff's complaint will be dismissed.

IT IS SO ORDERED.

/s/ Robert E. DeMascio
Senior United States District Judge

Dated: May 27, 1987

(Certification Omitted)

JUDGMENT

This cause comes before the court on defendants' motion for summary judgment, and the court having filed its Order,

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED

that defendants' motion be and the same hereby is GRANTED and plaintiff's complaint is hereby DISMISSED.

Dated at Detroit, Michigan, this 27th day of MAY, 1988.

/s/ Robert E. DeMascio
Senior United States District Judge

(Certification Omitted)